

Office of the Secretary of Labor

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not deployed in a manner that is designed to avoid the purposes of the Executive Order.

(e) If it is determined, pursuant to regulations issued by the Secretary of Labor, that the contractor is not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor, as provided in Executive Order No. 12933, the regulations of the Secretary of Labor at 29 CFR part 9, and relevant orders of the Secretary of Labor, or as otherwise provided by law.

(f) The Contracting Officer shall withhold or cause to be withheld from the prime contractor under this or any other Government contract with the same prime contractor such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator, the Administrative Law Judge, or the Administrative Review Board, that the prime contractor failed to comply with the terms of this clause, and that wages lost as a result of the violations are due to employees or that other monetary relief is appropriate.

(g) The contractor shall cooperate in any investigation by the contracting agency or the Department of Labor into possible violations of the provisions of this clause and shall make records requested by such official(s) available for inspection, copying, or transcription upon request.

(h) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: The contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract.

CONTRACTOR OBLIGATIONS

§ 9.7 May a contractor employ persons other than the predecessor contractor's employees?

(a) There shall be no employment openings under a contract subject to

the Executive Order and the successor contractor shall not offer employment under the contract until it fully complies with its obligation to offer a right of first refusal, except as provided under paragraph (b) of this section and § 9.8.

(b) A successor contractor may employ on the contract any employee who the contractor demonstrates has worked for that contractor for at least 3 months immediately preceding the commencement of the contract *and* would face lay-off or discharge if not employed on the subject contract.

§ 9.8 Must the successor contractor offer a right of first refusal to all employees of the predecessor contractor?

(a)(1) Except as provided in this section, a successor contractor shall offer employment under the contract (*i.e.*, a "right of first refusal") to those employees of the predecessor contractor who, in the final month of the contract, provided recurring building services similar to the services to be performed at one or more of the same public building(s) under the successor contract, and whose employment will be terminated as a result of the award of the successor contract or expiration of the contract under which the employees were hired.

(2) Unless the predecessor contractor (either directly or through the contracting agency) or the individual employee in question provides evidence to the contrary, the successor contractor must presume that *all* service employees of the predecessor contractor who are working at the same public building during the final month of contract performance will be terminated when the contract ends.

(b)(1) A successor contractor is not required to offer a right of first refusal to any managerial or supervisory employee or to any employee of the predecessor contractor who is not a service employee within the meaning of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 357(b). "Managerial and supervisory" employees and employees who are not "service employees" are those persons engaged in the performance of services under the contract who are employed in a bona fide executive,

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administrative, or professional capacity, as those terms are defined in the Fair Labor Standards Act regulations, 29 CFR part 541.

(2) The successor contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract. However, a successor contractor is not required to offer a right of first refusal to an employee of the predecessor contractor if the successor contractor is able to demonstrate its reasonable belief that the employee in fact failed to perform suitably on the predecessor contract—for example, through evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. The successor contractor must demonstrate that its belief that an employee has failed to perform suitably on the predecessor contract is reasonable and based upon credible information provided by a knowledgeable source such as the predecessor contractor, the employee's supervisor, or the contracting agency. Information regarding the general performance of the predecessor contractor is not sufficient.

(3) The successor contractor is not required to offer a right of first refusal for employment where a majority of the contractor's employees performing the service in question under the contract work both at the public building and at other locations under contracts not subject to the Executive Order and these regulations. See §9.5(b)(5)(ii) of this part.

(c) The successor contractor shall determine the number of employees necessary for the efficient performance of the contract. The contractor may, for bona fide staffing or work assignment reasons, employ fewer employees than the predecessor contractor. Thus, the successor contractor need not extend the right of first refusal to *all* employees of the predecessor contractor, but must offer employment only to the number of eligible employees it believes necessary to meet its anticipated staffing pattern, except that:

(1) Where a successor contractor offers a right of first refusal to fewer em-

29 CFR Subtitle A (7-1-00 Edition)

ployees than were employed by the predecessor contractor, its obligation to offer employment under the contract to the predecessor's employees continues for three months after commencement of the contract to fill vacancies created by employee termination, either voluntarily or for cause. For example, a contractor with eighteen (18) employment openings and a list of twenty (20) predecessor contractor's employees must continue to offer a right of first refusal to individuals on the list until eighteen (18) of the employees accept the contractor's employment offer, or until all of the employees have either accepted or refused the job offer. Further, if an employee quits or is terminated within three months of contract commencement and the contractor determines that it must hire an additional employee to sufficiently perform the contract requirements, the contractor must first offer a right of first refusal to an eligible employee of the predecessor contractor and must continue to offer a right of first refusal to the predecessor's employees until one of the employees accepts the contractor's employment offer, or, except as otherwise provided in this Section, until all of the employees have refused a job offer.

(2) If a successor contractor raises its staffing level within three months of the commencement of contract performance, its obligation to offer employment under the contract to eligible employees continues until the higher staffing level is reached. For example, if a contractor determines two months into the contract period that it must hire an additional ten (10) employees to sufficiently perform the contract requirements, the contractor must first offer a right of first refusal to ten (10) eligible employees of the predecessor contractor (or to all of the employees of the predecessor contractor who have not previously been offered a right of first refusal if less than ten remain), and must continue to offer a right of first refusal to the predecessor's employees until ten (10) of the employees accept the contractor's employment offer, or, except as otherwise provided in this Section, until all of the employees have refused a job offer.